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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SCOTT SZYMANSKI, Defendant and Appellant.	D052673 (Super. Ct. No. MH100918)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

I.

INTRODUCTION

In March 2007, the People filed a petition pursuant to the Sexually Violent Predators Act (SVPA or the Act) (Welf. & Inst. Code,[1] §§ 6600 et seq.) to commit Scott

1 Unless otherwise specified, subsequent statutory references are to the Welfare and Institutions Code.

Szymanski to the Department of Mental Health (the Department) for an indeterminate term of involuntary treatment.

On appeal, Szymanski contends that the amended SVPA violates state and federal constitutional guarantees of equal protection and due process, as well as the constitutional prohibition against ex post facto laws and double jeopardy. He further claims that he was "illegally committed" because a mental health protocol contained in a handbook that the Department provided to personnel who evaluate sexually violent predators for use in conjunction with their evaluations, contains a number of provisions that the Office of Administrative Law (OAL) has determined constitute illegal underground regulations. We reject Szymanski's claims on appeal and affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

On March 7, 2007, the People filed a petition seeking the involuntary commitment of Szymanski as a sexually violent predator (SVP) within the meaning of the SVPA.

On February 19, 2008, Szymanski waived his right to a jury trial. A court trial was held, during which the court heard evidence regarding Szymanski's three qualifying offenses. In 1986, Szymanski was convicted in Michigan of attempted second-degree criminal sexual conduct with a child under the age of 13, an offense equivalent to committing a lewd and lascivious act on a child under the age of 14, in violation of Penal Code section 288, subdivision (a). That count involved a seven-year-old female victim. In 1997, Szymanski was convicted of two counts of committing a lewd and lascivious act

on a child under the age of 14 (Pen. Code, § 288, subd. (a)). The 1997 counts involved a five-year-old female victim.

Szymanski was also convicted of the non-qualifying offense of violating Penal Code section 647, subdivision (a) by unlawfully annoying and molesting a child under 18 years of age after having suffered a prior conviction under Penal Code section 288. That incident involved a 10-year-old female victim.

Two mental health experts opined that Szymanski suffers from a diagnosed mental disorder, pedophilia ─ nonexclusive type. One of the experts also diagnosed Szymanski as suffering from cocaine and amphetamine abuse, as well as a major depressive disorder. The experts testified that Szymanski is likely to engage in sexually violent predatory criminal behavior in the future if released.

One mental health expert testified on Szymanski's behalf. That expert did not opine as to whether Szymanski suffers from any diagnosed mental disorder. The bulk of the expert's testimony involved his critique of a test that mental health evaluators use to assess the recidivism risk posed by individuals who have committed sexually violent offenses.

On February 29, 2008, the court found that Szymanski qualified as an SVP and issued an order committing him to the Department for an indeterminate term.

Szymanski filed a timely notice of appeal on March 3, 2008.

III.

DISCUSSION

A. *The SVPA legislative scheme*

Prior to 2006, the SVPA provided for a two-year commitment term for a person who was found to be an SVP.[2] At the end of that term, the People were required to file another petition seeking a determination that the person remained an SVP. If the People did not file a recommitment petition, the person would have to be released. (Former § 6604, as amended by Stats. 2000, ch. 420, § 3.) On the filing of a recommitment petition, a new jury trial was conducted at which the People again had the burden to prove beyond a reasonable doubt that the person was currently an SVP. (Former §§ 6604, 6605, subds. (d), (e); *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 ["[A]n SVP extension hearing is not a review hearing. . . . An SVP extension hearing is a new and independent proceeding at which . . . the [People] must prove the [committed person]

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2 As originally enacted, an SVP was defined as "a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Former § 6600, subd. (a).) However, the statute now provides that an SVP is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a).) Under the Act, a person is "likely" to engage in sexually violent criminal behavior (i.e., reoffend) if he or she "presents a substantial danger, that is, a serious and well-founded risk, that he or she will commit such crimes if free in the community." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922 (*Ghilotti*), italics omitted.) The SVPA does not require proof that the person "is more likely than not to reoffend." (*Ghilotti, supra*, 27 Cal.4th at p. 923, italics omitted.)

meets the [SVP] criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous."].)

In 2006 the SVPA was amended first by the Legislature and then, with the passage of Proposition 83, by the electorate. (Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83.) The amended SVPA provides that an individual who is determined to be an SVP must be "committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility." (§ 6604.) Once committed, the individual must have "a current examination of his or her mental condition made at least once every year." (§ 6605, subd. (a).) After the examination, the Department must file a report in the form of a declaration that addresses (1) "whether the committed person currently meets the definition of [an SVP]," and (2) "whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community." (*Ibid*.) The Department is to file this report with the trial court that committed the person, and must serve the report on the prosecuting agency and the committed individual. The committed individual may retain, or the court may appoint, a qualified expert to examine him or her. (*Ibid*.)

If the Department concludes in the report that the committed individual no longer meets the requirements of the SVPA, or that conditional release is appropriate, the Department must authorize the committed individual to petition the trial court for

release.[3] (§ 6605, subd. (b).) Upon receipt of the petition for conditional release or unconditional discharge, the trial court is to set a probable cause hearing at which the court "can consider the petition and any accompanying documentation provided by the medical director, the prosecuting attorney or the committed person." (*Ibid*.) If the trial court determines that probable cause exists to believe that the petition has merit, the trial court must set a hearing on the issue, at which time the committed individual is "entitled to the benefit of all constitutional protections that were afforded him or her at the initial commitment proceeding." (*Id*., subds. (c), (d).) Either side may demand a trial by jury and may retain experts to examine the committed individual. (*Id*., subd. (d).) Where the Department has authorized the individual to petition for either conditional release or unconditional discharge, the state bears the burden to prove beyond a reasonable doubt that the committed individual is still an SVP. (*Ibid*.)

The Department is required to seek judicial review of an individual's commitment not only at the time of the annual examination, but at any time that the Department "has reason to believe" a committed individual is no longer an SVP. (§ 6605, subd. (f).) Similarly, if the Department determines that the committed individual's "diagnosed mental disorder has so changed that the person is not likely to commit acts of predatory sexual violence while under supervision and treatment in the community," the Department must send a report recommending conditional release of the committed

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[3] The Department may authorize the committed individual to petition the court for either conditional or unconditional release, depending on the Department's findings and recommendations.

individual to the trial court, the county attorney, and the committed individual's attorney. (§ 6607, subd. (a).) The trial court is required to hold a hearing once the report is received. (*Id*., subd. (b).)

After the first year of commitment, a committed individual may petition the trial court for conditional release or unconditional discharge even without the "recommendation or concurrence" of the Department. (§ 6608, subds. (a), (c).) The committed individual is entitled to the assistance of counsel in preparing and filing the petition. The individual must serve the Department with the petition. (*Id*., subd. (a).) After receiving such a petition, the trial court "shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (*Ibid*.)

If, after receiving a petition filed by an individual without the recommendation concurrence of the Department, the trial court determines that a hearing is appropriate, the committed individual has the burden of proving by a preponderance of the evidence that the petition should be granted. (§ 6608, subd. (i).) If the trial court determines that the committed individual "would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community," the trial court must order that the individual be placed in a state-operated forensic conditional release program. (*Id*., subd. (d).) The court retains jurisdiction of the person throughout the course of the conditional release program, and, at the end of one year, the court must hold a hearing to determine whether the individual should be unconditionally released from commitment. (*Ibid.*) If the trial court denies the petition, the committed individual must

wait a year before petitioning the trial court again. (*Id*., subd. (h).) The trial court must deny any subsequent petition filed by that individual "unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (*Id*., subd. (a).) The SVPA is silent with respect to the hearing procedure for individuals who seek to be released without "supervision and treatment in the community," i.e., unconditional release.

As a result of Proposition 83's amendment to section 6604 making an SVP's commitment term indeterminate, as opposed to a two-year term, an SVP now remains committed, either fully or in a conditional release setting, "until he successfully bears the burden of proving he is no longer an SVP or the [Department] determines he no longer meets the definition of an SVP. [Citations.]" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287 (*Bourquez*).)

B. *Szymanski's constitutional arguments are unavailing*[4]

1. *The amended SVPA does not violate due process*

Szymanski argues that his indeterminate commitment under the amended SVPA violates his Fourteenth Amendment right to due process and his right to due process

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4 Szymanski argues that the amended SVPA violates both the federal and state Constitutions, but he makes no distinct arguments involving any state constitutional provision. The California Supreme Court has found the United States Supreme Court's "analysis of federal due process and equal protection principles persuasive for purposes of [analyzing SVPA claims under] the state Constitution." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1152, fn. 19 (*Hubbart I*).) We therefore apply the same standards to Szymanski's federal and state constitutional challenges.

The constitutional questions that Szymanski raises in this appeal are currently pending before the California Supreme Court. (See *People v. McKee* (2008) 160 Cal.App.4th 1517 [review granted July 9, 2008, S162823].)

under the California Constitution. Specifically, Szymanski complains that the statute requires that he bear the burden to prove his right to release, by a preponderance of the evidence, at any release hearing held pursuant to a petition that the Department has not authorized. He further complains that the statute places the burden of proof on him with regard to a petition that the Department has authorized, because he is entitled to a jury trial only if the court initially determines that "probable cause exists to believe that [the SVP's] diagnosed mental disorder has so changed that he or she is not a danger to the health and safety of others and is not likely to engage in sexually violent criminal behavior if discharged." (§ 6605, subd. (c).) According to Szymanski, this means that the state does not bear the burden of proof to establish that he still qualifies as an SVP, but instead, he must "prove that his condition has changed." He maintains that due process requires that the state carry the burden of proof in all commitment proceedings, including any proceeding to continue his detention as an SVP.

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. [Citations.]" (*Addington v. Texas* (1979) 441 U.S. 418, 425 (*Addington*).) "Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. [Citations.]" (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79 (*Foucha*).)

For an initial civil commitment, due process requires that the state prove by clear and convincing evidence both that the person is mentally ill and that the commitment is

required for his or her own welfare or for the protection of others.[5] (*Kansas v. Hendricks* (1997) 521 U.S. 346, 358 (*Hendricks*); *Addington, supra*, 441 U.S. at pp. 426-427, 432-433.) Once the person has been committed, due process permits the state to hold the person only as long as he or she is both mentally ill and dangerous, but no longer. (*Foucha, supra*, 504 U.S. at pp. 71-78 [continuing to hold dangerous person who is no longer mentally ill violates due process]; *Jones v. United States* (1983) 463 U.S. 354, 368, 370 (*Jones*) ["acquittee is entitled to release when he has recovered his sanity or is no longer dangerous"].)

According to Szymanski, the SVPA improperly places the burden on him to prove that he should be released, rather than placing the burden of proof on the state to prove that he is still an SVP. Szymanski bases his argument primarily on *Foucha, supra*, 504 U.S. 71. In *Foucha*, the United States Supreme Court considered the constitutionality of a Louisiana statute that provided for the indefinite involuntary commitment of individuals who had been found not guilty by reason of insanity and who had been determined to be dangerous, but not mentally ill. The trial court in *Foucha* had determined that the defendant suffered from a personality disorder that was not considered a mental illness or, for that matter, a treatable disorder. There was testimony that the defendant was not suffering from either a neurosis or psychosis, and the state was "not claim[ing] that Foucha is now mentally ill." (*Id*. at p. 75, 80.) The *Foucha* court held that "a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not

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5 The SVPA imposes a more rigorous burden, requiring that the state establish the need for an initial civil commitment by proof beyond a reasonable doubt. (§ 6604.)

mentally ill but who do not prove they would not be dangerous to others," violated the Due Process clause. (*Foucha, supra*, 504 U.S. at p. 83.)

The *Foucha* court acknowledged the holding in *Addington* that a state may not civilly commit a person unless it establishes by clear and convincing evidence that the person is mentally ill and dangerous. (*Foucha, supra*, 504 U.S. at pp. 75-76, 86, citing *Addington, supra*, 441 U.S. at pp. 425-433.) The court also noted its holding in *Jones, supra*, 463 U.S. 354, that a person who is found not guilty by reason of insanity may be automatically confined without a separate hearing to determine his or her current mental illness or dangerousness because the verdict is presumed to have shown those requirements, but that an insanity acquittee is entitled to release when he or she is no longer mentally ill or dangerous. (*Foucha, supra*, 504 U.S. at pp. 76-78.) What the *Foucha* court found significant was that the evidence presented at a review hearing established that the insanity acquittee in that case was not currently mentally ill. It was for this reason that the court concluded that Foucha's continued confinement violated his constitutional right to due process. (*Foucha, supra*, 504 U.S. at p. 79.)

Szymanski contends that *Foucha* holds that a defendant may not "be held indefinitely without the State being required to prove the need for continued commitment." He bases this argument on language in *Foucha*, in which the court noted with disapproval that the Louisiana statute shifted the burden of proof from the state to Foucha on the issue of Foucha's dangerousness. Specifically, the *Foucha* court stated:

> "[T]he State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no

> longer exists. [Citations.] However, the State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of proving even this ground for confinement by clear and convincing evidence. The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee . . . ." (*Foucha*, *supra*, 504 U.S. at p. 86.)

One must consider the court's disapproval of the state's position with regard to Foucha in the context of the situation that existed in that case. The State of Louisiana was not contending that Foucha was mentally ill at the time of the hearing, but only that he was dangerous. (*Foucha, supra*, 504 U.S. at p. 78.) Because Louisiana was not contending that Foucha was mentally ill, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State [wa]s no longer entitled to hold him on that basis. [Citation.]" (*Ibid*.) Louisiana argued that under *United States v. Salerno* (1987) 481 U.S. 739, it could continue to detain Foucha on the sole ground that he was dangerous. In rejecting Louisiana's argument, the *Foucha* court noted that the state had not proven by clear and convincing evidence even *at an initial commitment proceeding* that Foucha was, in fact, dangerous to the community. (*Foucha, supra*, 504 U.S. at p. 81.)

We read *Foucha* as prohibiting the continued confinement of an insanity acquittee who is no longer mentally ill, particularly where the state has not proven, by clear and

convincing evidence, that the individual poses a danger to the community.[6] *Foucha* does not address the burden of proof that would apply at future release hearings, after the state *has* established beyond a reasonable doubt that an individual is mentally ill and poses a danger. *Foucha* thus does not support Szymanski's due process challenge to section 6608's provision that places on him the burden to prove by a preponderance of the evidence that he is entitled to release on the ground that he no longer meets the SVP criteria.

The United States Supreme Court has held that placing the burden of proof on a person who is under a civil commitment does not violate due process. In *Jones, supra*, 463 U.S. at pages 357, 366-368, the insanity acquittee bore the burden of proving, by a preponderance of the evidence, that he was no longer mentally ill or dangerous. The *Jones* court observed, "The statute provides several ways of obtaining release. Within 50 days of commitment the acquittee is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. [Citation]. If he fails to meet this burden at the 50-day hearing, the committed acquittee subsequently may be released, with court approval, upon certification of his recovery by the hospital chief of service. [Citation.] Alternatively, the acquittee is entitled to a judicial hearing every six months at

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6 The *Foucha* court stated, "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill." (*Foucha, supra*, 504 U.S. at p. 86.)

which he may establish by a preponderance of the evidence that he is entitled to release. [Citation.]" (*Jones*, *supra*, 463 U.S. at pp. 356-357, fn. omitted.) The *Jones* court thus implicitly approved a review procedure similar to the one at issue here.

The initial commitment hearing under the amended SVPA provides a significant level of due process protection by requiring a finding beyond a reasonable doubt that the individual meets the SVP criteria. The required periodic reviews of a committed individual's mental health status, and the procedures that permit these individuals to petition for release, minimize the risk of an erroneous deprivation of liberty. We conclude that requiring Szymanski to bear the burden to prove by a preponderance of the evidence that he is eligible for release at a hearing on any subsequent petition for release filed without the Department's authorization does not violate Szymanski's constitutional right to due process. Similarly, the existence of the show cause hearing procedure applicable to release petitions filed with the Department's authorization does not violate Szymanski's constitutional right to due process.

Szymanski also contends that even if he is able to prove that he no longer meets the definition of an SVP, he "does not get unconditionally released [under the amended SVPA] until he spends a full year in an out-patient program." Although Szymanski does not separately argue that this constitutes a due process violation, he suggests that the lack of immediate release upon a finding that an individual is no longer an SVP should be considered in determining whether the amended SVPA violates due process.

The SVPA is silent with regard to the procedure a court should utilize when a committed individual files a petition for *unconditional* discharge that the Department has

not authorized. Instead, much of section 6608 addresses the procedure that the court is to apply when considering unauthorized petitions for *conditional* release. (§ 6608, subds. (d)-(f).) When a statute is silent on a matter, we are to construe the statute in a manner consistent with applicable constitutional provisions, in order that the statute may be upheld. (*People v. Globe Grain & Milling Co.* (1930) 211 Cal. 121, 127.) Consistent with our obligation to apply a "presumption of constitutionality" to "every legislative act" (*ibid.*), we interpret the statute to require a trial court to order the unconditional release of a committed individual who has filed an unauthorized petition, and who establishes that he or she is no longer mentally ill or no longer dangerous. (See *Foucha, supra*, 504 U.S. at pp. 77–78 [state may not hold dangerous person who is no longer mentally ill]; *Jones, supra*, 463 U.S. at pp. 368, 370; *O'Connor v. Donaldson* (1975) 422 U.S. 563, 575 [state may not confine harmless mentally ill person].)[7]

2. *Szymanski's equal protection claim is without merit*

Szymanski asserts that the SVPA "now stands as the sole instance of a potential lifetime civil confinement, imposed without the additional protection of periodic review and re-commitment hearings where the burden of proof is placed on the state to justify the recommitment in front of a jury." (Italics omitted.) Szymanski challenges on equal protection grounds the "differences between how he will be treated in the recommitment

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7 Subdivision (g) of section 6608 suggests that unconditional discharge *is* available even for a petitioner who did not receive the Department's authorization to file a petition. (§ 6608, subd. (g) ["If the court rules against the committed person at the trial for unconditional release from commitment, the court may place the committed person on outpatient status . . . "].)

process [under the SVPA] when compared to persons committed under California's other civil commitment schemes." In particular, Szymanski contends that there is no justification for shifting the burden of proof to those committed under the SVPA and depriving SVP's of the right to a jury trial during "recommitment" proceedings, while no other civil commitment scheme involves similar burden shifting or denies committed individuals the right to a jury trial. We disagree.

a. *Applicable standards for equal protection claims*

"The right to equal protection of the laws is guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. The 'first prerequisite' to an equal protection claim is "'a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" . . . ' [Citation.]" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1216 (*Hubbart II*).) Because individuals who are not similarly situated need not be treated equally (*People v. Green* (2000) 79 Cal.App.4th 921, 924 (*Green*)), the first step in an equal protection analysis is to determine whether the two identified groups are in fact similarly situated (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199). The inquiry is not whether the two groups are similarly situated for all purposes, but, rather, whether they are similarly situated for purposes of the law being challenged. (*Ibid*.)

"'Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.] The state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will

be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.' [Citation.]" (*Hubbart II, supra*, 88 Cal.App.4th at p. 1217.) "Strict scrutiny is the appropriate standard against which to measure claims of disparate treatment in civil commitment. [Citations.]" (*Green, supra*, 79 Cal.App.4th at p. 924.) In applying this standard, the state has the burden of establishing that it has a compelling interest that justifies the law and that the distinctions made by that law are necessary to further its purpose. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 641.)

b. *A comparison of the SVPA to other civil commitment schemes does not establish that the SVPA's indeterminate commitment scheme violates Szymanski's right to equal protection*

Szymanski claims that he was denied equal protection of the laws, under both the federal and state Constitutions, because he was committed for an indeterminate term and will bear the burden in subsequent proceedings to establish that he no longer qualifies as an SVP, without the benefit of a jury trial. In contrast, Szymanski notes that individuals who are committed under other civil commitment statutes are committed for fixed terms and receive the benefit of jury trials at which the state bears the burden to prove that their commitments must be extended. We reject Szymanski's contention.

(i) *SVP's and persons who are civilly committed under other legislative schemes are not similarly situated for purposes of recommitment procedures*

Szymanski argues that persons who are committed under the amended SVPA, persons committed under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.) (MDO's), persons found not guilty by reason of insanity (NGI's) (Pen. Code, § 1026 et seq.), and persons committed under the Lanterman-Petris-Short Act (§ 5000 et seq.) (LPSA) are all similarly situated for the purpose of evidentiary burdens and jury rights in recommitment proceedings. We disagree.

The premise that SVP's are similarly situated to MDO's, NGI's, and persons committed under the LPSA overlooks significant differences in the relevant commitment schemes and their purposes with respect to the degree and type of danger that persons committed under the different schemes pose, as well as the severity of the mental illness, prognosis, and amenability to treatment of persons in the different groups. Although SVP's, MDO's, NGI's and individuals committed under the LPSA all suffer from mental disorders, the dangers that those in each group pose are different. While the SVPA narrowly targets "'a small but extremely dangerous group of sexually violent predators' [citation]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253), the other classifications involve a broad range of mental illness and associated conduct. For example, those involuntarily committed under the LPSA include individuals who have not committed any crime. (§ 5300.5, subd. (b).)

In addition, an SVP is civilly committed in large part because of the likelihood that he or she will engage in sexually violent criminal behavior in the future. (See Ballot

Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127 ["Sex offenders have very high recidivism rates. According to a 1998 report by the U.S. Department of Justice, sex offenders are the least likely to be cured and the most likely to reoffend . . . ."].) The SVP group poses a substantial danger to the community, has an extremely high rate of recidivism, requires long-term treatment, and has only a limited likelihood of improvement. On the other hand, the other classification groups may include individuals who suffer from mental illnesses that are of short duration, are not likely to reoccur, and/or who have the potential to be successfully treated with medication or other therapeutic interventions. (See, e.g., *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1163 [determining that SVP's and MDO's are not similarly situated for purposes of equal protection claim based on differential treatment requirements].)

We conclude that for purposes of an equal protection analysis with regard to determinate versus indeterminate commitment schemes and evidentiary burdens, SVP's and persons who have been committed under different civil commitment statutes are not similarly situated.

(ii) *The government has a compelling interest in treating SVP's differently from persons who are civilly committed for other reasons*

Even if we were to assume, arguendo, that SVP's, MDO's, NGI's and those committed under the LPSA are similarly situated for purposes of the procedures that Szymanski challenges, we would nevertheless conclude that the disparate treatment of these groups is necessary to further a compelling state interest.

Szymanski contends that the state does not have a compelling interest in imposing indeterminate terms on SVP's and requiring them to bear the burden of proof at hearings on petitions not authorized by the Department, while providing determinate terms and the right to recommitment proceedings at which the People have the burden of proof at the conclusion of the determinate terms for MDO's, NGI's and those committed under the LPSA.

We conclude that there is a compelling state interest in committing SVP's to indeterminate terms, regardless of the commitment terms that are imposed on those who are committed under other civil commitment statutes. SVP's are given indeterminate, rather than fixed, terms of civil commitment because they are less likely to be cured and more likely to reoffend than are other civil committees. (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) SVP's are thus deemed more dangerous than persons who are committed under other civil commitment schemes.

As the California Supreme Court has noted, the SVPA, as originally enacted, "narrowly target[ed] 'a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders [who] can be identified while they are incarcerated.' [Citation.]" (*Cooley v. Superior Court, supra*, 29 Cal.4th at p. 253.) With respect to the prior version of the SVPA, the California Supreme Court stated, "The problem targeted by the Act is acute, and the state interests─protection of the public and mental health treatment─are compelling." (*Hubbart I, supra*, 19 Cal.4th at p. 1153, fn. 20.)

In election materials pertaining to Proposition 83, voters were presented with information that sex offenders "prey on the most innocent members of our society" and that such offenders "have very high recidivism rates" and are the "least likely to be cured and the most likely to reoffend." (See Ballot Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) As noted in *People v. Shields* (2007) 155 Cal.App.4th 559, 564, in passing Proposition 83, the voters intended to enhance the confinement of SVP's: "Proposition 83 states that the change from a two-year term to an indeterminate term is designed to eliminate automatic SVP trials every two years when there is nothing to suggest a change in the person's SVP condition to warrant release . . . ." The change from the two-year fixed term to an indeterminate term was also intended to reduce the costs of SVP evaluations and court testimony. (*Bourquez, supra*, 156 Cal.App.4th at p. 1287.) Based on the evidence of the voters' intent in passing Proposition 83, we conclude that the changes made by Proposition 83, including the change from a two-year civil commitment to an indeterminate term, were in furtherance of compelling state interests.

The particularized dangerousness of SVP's and the limited success in treating them—characteristics that voters recognized in passing Proposition 83—justify the state treating SVP's differently from the manner in which it treats individuals who are civilly committed under other statutes. Voters could reasonably have concluded that SVP's should be committed to indeterminate terms, subject to hearings on petitions for release at which the SVP may be required to bear the burden to prove by a preponderance of the evidence that he or she is no longer an SVP. We conclude that the disparities between the procedures that apply in recommitment proceedings for SVPS and those that apply in

hearings for MDO's, NGI's, and persons committed under the LPSA, do not violate the SVP's constitutional right to equal protection.

3. *The amended SVPA is not an ex post facto law and does not violate the prohibition against double jeopardy*

Szymanski contends that the amended SVPA is criminal in nature, not civil, and that the application of the amended SVPA to him violates the ex post facto and double jeopardy provisions of the federal and state Constitutions.[8] We disagree with Szymanski's contention.

Article I, section 10, of the United States Constitution prohibits the states from passing any law that retroactively alters the definition of a crime or increases the punishment for a criminal act. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.) Only penal statutes may implicate federal ex post facto protection. (*Hendricks, supra*, 521 U.S. at p. 370; see also *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504–505.) Further, if the SVPA applies only prospectively, permitting confinement only on a finding of current mental disorder and the likelihood of posing a future danger to the public, it does not violate the prohibition against ex post facto laws. (See *Hendricks, supra*, 521 U.S. at p. 371; see also *People v. Whaley* (2008) 160 Cal.App.4th 779, 792–796; *Bourquez, supra*, 156 Cal.App.4th at pp. 1288–1289.)

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8 Szymanski does not distinguish between the federal and state Constitutions. We therefore address the thrust of his argument, which involves only the federal Constitution. In any event, the "federal and state ex post facto clauses are interpreted identically. [Citation.]" (*Hubbart I, supra*, 19 Cal.4th at p. 1171.)

The United States Supreme Court rejected a similar ex post facto challenge to a Kansas sexually violent predator statute. (*Hendricks, supra*, 521 U.S. at pp. 362–368, 370–371.) Based on the United States Supreme Court's analysis in *Hendricks*, the California Supreme Court upheld the previous version of the SVPA against challenges that it was a punitive statute that implicated federal ex post facto concerns. (*Hubbart I, supra*, 19 Cal.4th at pp. 1170–1179; see *Hubbart II, supra*, 88 Cal.App.4th at pp. 1209, 1226 , cert. den. *sub nom.*; *Hubbart v. California* (2002) 534 U.S. 1143.)

Szymanski argues that amendments to the SVPA have made the statute punitive in nature, despite the fact that the Act has a stated civil purpose. According to Szymanski, Proposition 83 was intended to increase criminal penalties for sex offenders. He contends that the arguments presented in favor of Proposition 83 demonstrate that the drafters and voters were not concerned with providing treatment to mentally ill persons who commit sex offenses, but instead, were interested in keeping sex offenders "locked up." In support of his contention that the amended SVPA is a punitive statute, rather than a civil statute, Szymanski focuses on several changes in the SVPA, including: (1) the fact that the SVPA now provides for an indefinite term of commitment, such that, according to Szymanski, "even if the Department of Mental Health determines that the defendant no longer qualifies as a sexually violent predator and does not need further treatment, the defendant must still prevail at two hearings before [being] released"; (2) the fact that previously, former SVP's were required only to register as sex offenders but "are now prohibited from living in large portions of the state and required to wear GPS monitors, at their own expense, for the rest of their lives"; and (3) the fact that SVP's

under the prior version of the SVPA received a jury trial every two years, but now an SVP is entitled to "a full blown jury trial with the burden of proof on the state" only when the Department authorizes the filing of an annual petition.

In determining whether the amended SVPA is punitive for purposes of federal constitutional law, we apply the same analysis that the California Supreme Court used when it considered a similar challenge to the original SVPA in *Hubbart I, supra*, 19 Cal.4th at pp. 1170–1179. Whether a particular proceeding should be considered to be civil or criminal is initially a question of statutory construction. We first attempt to determine whether the body enacting the law intended to establish civil, rather than criminal, proceedings. (*Hendricks, supra*, 521 U.S. at p. 361.) Courts ordinarily defer to the enacting body's stated intent, and "will reject the [L]egislature's[9] manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' [Citation.]" (*Ibid*.)

With regard to the original SVPA, the Legislature's placing the Act in the Welfare and Institutions Code, rather than in the Penal Code, evidences the Legislature's intent that the SVPA be considered civil, rather than criminal. It is evident from the original SVPA that the Legislature intended to create a civil commitment procedure designed to

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9 Although statutory interpretation often involves questions regarding a legislative body's intent in enacting a statute or ordinance, because Proposition 83 was enacted by the voters of the State of California, in this situation we must ascertain the intent of the voters as the enacting body. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900–901.)

protect the public from harm. (See *Hendricks, supra*, 521 U.S. at p. 361; *Hubbart I, supra*, 19 Cal.4th at p. 1171.) The amended SVPA retains the basic structure of civil commitment procedures to treat mentally ill persons who have committed acts of sexual violence, and the same statutory placement in the Welfare and Institutions Code, as the original SVPA. These factors support the conclusion that the amended SVPA is, like the original SVPA, civil in nature.

We next consider whether the effects of the amended SVPA are so punitive that the Act should be considered a criminal statute. When analyzing the effects of a statutory scheme, we consider a non-exhaustive, non-dispositive list of seven factors that provide "a useful framework" for considering whether a statute is punitive in purpose or effect. (*Smith v. Doe* (2003) 538 U.S. 84, 97.) These factors include whether the statutory scheme: (1) "has been regarded in our history and traditions as a punishment," (2) "imposes an affirmative disability or restraint," (3) "promotes the traditional aims of punishment," (4) "has a rational connection to a nonpunitive purpose," (5) "is excessive with respect to this purpose," (6) "whether the regulation comes into play only on a finding of scienter," and (7) "whether the behavior to which it applies is already a crime." (*Id.* at pp. 97, 105.)

Commitment of the dangerously mentally ill is a legitimate governmental objective that has historically been viewed as nonpenal. (*Hendricks, supra*, 521 U.S. at pp. 362–363; see *Hubbart I, supra*, 19 Cal.4th at pp. 1172–1173.) Commitment of SVP's under the original SVPA did not implicate the two primary objectives of criminal punishment—retribution and deterrence. The original SVPA was not retributive because

it did not assign culpability for prior criminal conduct, but, rather, used the existence and nature of the prior conduct as evidence of the existence of a mental disorder and/or future dangerousness. (See *Hendricks, supra*, 521 U.S. at pp. 361–363; *Hubbart I, supra*, 19 Cal.4th at p. 1175.)

The amendments to the SVPA did not change this. Similarly, there is no basis on which to conclude that the amendments to the SVPA create an increased deterrent effect over the original SVPA. Persons committed pursuant to sexually violent predator laws suffer from mental disorders that prevent them from exercising sufficient control over their conduct. Such individuals are unlikely to be deterred by the threat of civil confinement. (*Hendricks, supra*, 521 U.S. at pp. 362–363.) Because under the amended SVPA, it must still be determined that SVP's suffer from mental disorders that prevent them from exercising sufficient control over their conduct, the amendments to the SVPA do not make it any more likely that a sexually violent predator will be deterred by its provisions than he or she would be under the provisions of the original SVPA.

Further, under both the original and amended versions of the SVPA, a jury need not make a finding of scienter or criminal intent to find that a person is an SVP. (*Hendricks, supra*, 521 U.S. at p. 362; compare with Pen. Code, § 20 [criminal act requires both act and intent].) The absence of an intent requirement constitutes further evidence that neither the original SVPA nor the amended SVPA were intended to be retributive. (*Hendricks, supra*, 521 U.S. at p. 362.)

The fact that the amended SVPA provides for an indeterminate term of commitment, rather than a determinate two-year term, as in the original SVPA, does not

alter the civil nature of the statutory scheme. Commitment under the amended SVPA is distinct from an indefinite prison term in that treatment of the committed person is a goal of the amended SVPA. (See *Hendricks, supra*, 521 U.S. at pp. 365–368; *Hubbart I, supra*, 19 Cal.4th at p. 1174.) Both the original and the amended SVPA provide for treatment, in addition to confinement, of those found to be SVP's. (See § 6604.) Further, the United States Supreme Court has held that the duration of commitment is not evidence in and of itself of a punitive intent where it is linked to the purpose of that commitment, i.e., to hold the individual until his or her mental disorder no longer poses a threat to others. (*Hendricks, supra*, 521 U.S. at pp. 363–364; *Hubbart I*, *supra*, 19 Cal.4th at pp. 1173, 1176.) The California Supreme Court has held that the original SVPA was designed to ensure that the committed person did not remain confined past a point at which he or she ceased to suffer from a mental abnormality rendering him or her unable to control his or her dangerousness. (*Hubbart I, supra*, 19 Cal.4th at p. 1177.) The amended SVPA is no different. Under the amended SVPA, once a committed individual is adjudged to no longer meet the definition of an SVP, he or she is entitled to release. Thus, the change from a determinate to an indeterminate commitment term does not support the conclusion that the amended SVPA is more punitive than the original SVPA.

Szymanski notes that under the amended SVPA, he has no right to a jury trial on a petition seeking release or discharge unless he first receives authorization from the Department to file a petition. (See § 6608, subd. (d).) However, as we have previously noted, Szymanski had a right to a jury trial at the initial commitment hearing and at any

hearing on a petition authorized by the Department. (See §§ 6603, subd. (a), 6604, 6605, subd. (d).) One purpose of the amendments to the SVPA under Proposition 83 was to eliminate "unnecessary or frivolous jury trial actions where there is no competent evidence to suggest a change in the committed person." (Ballot Pamp., Gen. Elec. (Nov. 7, 2006), text of Prop. 83, p. 127.) It is clear that the change from a statutory scheme involving a determinate term and the right to a jury trial for recommitment proceedings under the original SVPA, to a statutory scheme involving an indeterminate term with no jury trial right for unauthorized petitions for release, did not have a punitive purpose. We conclude that the fact that the amended SVPA does not provide for the right to a jury trial on a petition filed by an SVP who has not received Department authorization does not render the amended SVPA a punitive, rather than civil, statute.

The underlying purpose and intent of the SVPA has not changed. The amended SVPA still requires a judicial finding that the detainee is an SVP, meaning not only that the person has committed a qualifying offense, but that the person suffers from "a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) The original and amended versions of the SVPA are thus quite similar with respect to whether the SVPA is punitive, for purposes of ex post facto concerns. We therefore conclude that the amended version of the SVPA, like the original SVPA, is not punitive in either purpose or effect, for purposes of determining whether the Act violates the federal constitutional prohibition against ex post facto laws. (See *Hendricks, supra*, 521 U.S. at pp. 360–369.)

We similarly reject Szymanski's contention that his commitment under the amended SVPA constitutes double jeopardy. The double jeopardy clause of the federal Constitution prohibits punishing an individual twice for the same offense. (*Hendricks, supra*, 521 U.S. at p. 369.) As we have already concluded, commitment under the amended SVPA is civil in nature, not punitive. A commitment under the amended SVPA thus does not constitute a second prosecution or second punishment for the same offense for which Szymanski was previously convicted and incarcerated. (See *Hendricks, supra*, 521 U.S. at p. 369; see also *Hubbart II, supra*, 88 Cal.App.4th at p. 1226.)

C. *Szymanski's claim that his commitment is illegal as a result of the Department's use of an "underground regulation" fails*

Szymanski challenges the legality of his commitment because it derived from the Department of Mental Health's reliance on a mental health evaluation protocol, parts of which the OAL has since determined to constitute "underground regulation[s]."[10] Szymanski contends that the "illegality of the [Department's] protocol means that his commitment as a sexually violent predator is, and was, illegal and void from before its inception."

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10 State agencies must formally adopt regulations in compliance with the procedural requirements of the Administrative Procedures Act (APA). Certain guidelines that have not been adopted pursuant to the APA are considered to be illegal "underground regulations." (See Cal. Code Regs., tit. 1, § 250, subd. (a) ["'Underground regulation' means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA."].)

We reject Szymanski's claim because even if we presume that the OAL determination is correct and the Department's protocol does constitute an underground regulation, the Department's use of the protocol does not undermine the legitimacy of Szymanski's commitment. Other appellate courts have reached similar conclusions when faced with this claim. (See *People v. Castillo* (2009) 170 Cal.App.4th 1156 [2009 Cal. App. LEXIS 126] (*Castillo*); see also *People v. Medina* (Feb. 25, 2009, A120517) ____Cal.App.4th____ [2009 Cal.App. LEXIS 221].)

1. *Additional background*

The process for committing an individual under the SVPA begins when prison officials screen an inmate's records to determine whether it is likely that he or she is an SVP. (§ 6601, subds. (a), (b).) If prison officials make such a determination, the inmate is referred to the Department for a full evaluation as to whether he or she meets the SVP criteria. (*Id*., subd. (b).) Two mental health professionals designated by the Department are to "evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article." (*Id*., subds. (c), (d).) "The standardized assessment protocol [to be used by the evaluators] shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (*Id*., subd. (c).)

If the evaluators agree that the person meets the SVP criteria, the director of the Department must forward a request for a commitment petition to the county in which the offender was convicted. (§ 6601, subd. (d).) If the county's legal counsel concurs with the Director's recommendation, "the district attorney or the county counsel of that county" is to file a commitment petition in the superior court. (§ 6601, subd. (i).)

"Once the petition is filed, a superior court judge must 'review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that [the individual] is likely to engage in sexually violent predatory criminal behavior upon his or her release.' [Citation.] If the judge makes that determination from this facial review, the judge orders the defendant detained in a secure facility pending a probable cause hearing under section 6602." (*People v. Hayes* (2006) 137 Cal.App.4th 34, 42–43 (*Hayes*).) "If the trial court determines there is probable cause, the SVP petition proceeds to trial. [Citation.] Either party may demand a jury trial. The defendant has the right to the assistance of counsel, to retain experts, and to access to relevant psychological and medical reports. He can only be found to be an SVP by a standard of beyond a reasonable doubt, and any jury verdict must be unanimous." (*Id*. at p. 44; see also § 6603, subds. (a), (b), (e), (f); § 6604.)

Consistent with the obligations set forth in section 6601, subdivision (c), the Department published the "Clinical Evaluator Handbook Standardized Assessment Protocol (2007)" (Handbook), to assist evaluators who conduct SVP evaluations on prisoners and evaluations of SVP's who are subject to recommitment. In August 2008, the OAL determined that 10 portions of the Handbook constitute "regulations" that the

Department should have adopted in conformance with the procedures set forth in the APA. According to the OAL, the portions of the Handbook that were not promulgated pursuant to the APA constitute illegal "underground regulations." (2008 OAL Determination No.19.)

2. *Analysis*

As an initial matter, the People assert that Szymanski forfeited this claim by failing to challenge the Department's use of the Handbook in the trial court. We agree that Szymanski should have raised this challenge first in the trial court. (See *Ghilotti, supra*, 27 Cal.4th at pp. 912–913 [challenges to an SVP petition on ground of lack of compliance with the statutory requirement regarding evaluators' opinions should be raised in trial court]; *People v. Superior Court* (*Preciado*) (2001) 87 Cal.App.4th 1122, 1130 (*Preciado*) [challenge that "the required evaluations have not been performed" is to be brought to "the trial court's attention"].) Szymanski argues that this court should nevertheless consider the merits of his argument because his trial counsel's failure to raise this challenge in the trial court amounted to ineffective assistance of counsel. We therefore consider Szymanski's contention on its merits.

Szymanski offers no authority to support his assertion that the use of an "underground regulation" during the pre-petition administrative proceedings renders the subsequent commitment proceedings void, and thus subject to per se reversal for lack of jurisdiction. In suggesting that the Department's use of the challenged protocol deprives the trial court of fundamental jurisdiction to order commitment following a jury trial,

Szymanski fails to acknowledge the limited role that the Handbook plays in the preliminary phase of the SVP proceedings.

The Department is statutorily required to use the protocol for the purpose of administrative actions that *lead up to* the filing of an SVP petition. (§ 6601, subds. (c), (d).) "'[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.' [Citation.] 'After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. [Citation.]' [Citation.]" (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.)

"[O]nce the petition is filed a new round of proceedings is triggered. [Citation.]" (*Preciado, supra*, 87 Cal.App.4th at p. 1130.) Specifically, after a petition is filed, the court holds a probable cause hearing, at which the court's focus shifts away from "assessing formal conformance with procedural requirements to evaluating the[] probative value [of the evaluations] on the substantive SVP criteria." (*Castillo, supra*, 170 Cal.App.4th at p. ____ [2009 Cal.App.LEXIS at p. *36].) "The probable cause hearing under the SVPA is analogous to a preliminary hearing in a criminal case as both are designed to protect the accused from having to face trial on groundless or otherwise unsupported charges." (*Castillo, supra*, 170 Cal.App.4th at p. ____ [2009 Cal.App.LEXIS at p. *37].) "'The probable cause hearing, therefore, is only a preliminary determination that cannot form the basis of a civil commitment; the ultimate

determination of whether an individual can be committed as an SVP is made only at trial. . . . Like a criminal preliminary hearing, the only purpose of the probable cause hearing is to test the sufficiency of the evidence supporting the SVPA petition.' [Citations.]" (*Castillo, supra*, 170 Cal.App.4th at p. ____ [2009 Cal.App.LEXIS at p. *37.)

In analogous circumstances in the context of a criminal prosecution, the Supreme Court has concluded that defects in the preliminary hearing phase of a criminal proceeding do not automatically invalidate a subsequent conviction; rather, a defendant must show that he or she was prejudiced by the challenged defect. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530 (*Pompa-Ortiz*).) "[I]rregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if [the] defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects." (*Id.* at p. 529.) "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." (*Ibid*.)

The *Pompa-Ortiz* rule "applies to SVP proceedings." (*Hayes, supra,* 137 Cal.App.4th at p. 51.) Furthermore, the rule applies equally to the "denial of substantial

rights as well as to technical irregularities," including claims of the denial of counsel and ineffective assistance of counsel at a preliminary hearing. (*Id*., at pp. 50–51.) This court has held that the failure to obtain the evaluations of two mental health professionals, as required under section 6601, subdivision (d), did not deprive the court of fundamental jurisdiction to act on an SVP petition. (*Preciado, supra*, 87 Cal.App.4th at pp. 1128-1130.) The defect "was not one going to the substantive validity of the complaint, but rather was merely in the nature of a plea in abatement, by which a defendant may argue that for collateral reasons a complaint should not proceed." (*Id*. at p. 1128.)

Like the requirement that a potential SVP be examined by two evaluators, a requirement that the Department utilize a protocol that has been adopted pursuant to the APA is a matter that is collateral to the merits of Szymanski's SVP petition. We reject Szymanski's assertion that a defect in the Department's evaluative process deprived the trial court of fundamental jurisdiction to act on his petition. Rather, Szymanski must demonstrate that he was prejudiced by the Department's use of the Handbook. He has not attempted to make such a showing.

Szymanski fails to explain how use of the evaluation protocol resulted in actual prejudice to him, either by depriving him of a fundamental right or a fair trial. Szymanski was represented by counsel and had the opportunity to cross-examine the witnesses against him. He does not challenge the sufficiency of the evidence to support the court's finding at the probable cause hearing, or the jury's findings at trial. Rather, Szymanski repeatedly asserts that the Department's failure to meet the requirements of the APA in adopting the Handbook deprives the trial court of jurisdiction to consider the

SVP petition. Because Szymanski has failed to demonstrate any prejudice, we reject his challenge to the Department's use of an "underground regulation" in evaluating him under the SVPA.

In view of Szymanski's failure to demonstrate that he suffered prejudice as a result of the Department's use of an underground regulation, as required under *Pompa-Ortiz*, we also reject his claim of ineffective assistance of counsel. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.